

STATE OF NEW HAMPSHIRE  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

KEENE STATE COLLEGE PAT STAFF	:	
ASSOCIATION, Affiliated with NHEA/NEA	:	
	:	
and	:	CASE NO. <u>U-0602</u>
	:	
UNIVERSITY OF NEW HAMPSHIRE,	:	Decision No. 780007
KEENE STATE COLLEGE	:	

APPEARANCES

Representing the Keene State College PAT Staff Association:

Sylvia Donahue, Special Field Services Coordinator, NHEA/NEA  
Ernest Gendron, President, K.S.C. PAT Staff Association

Representing the University of New Hampshire, Keene State College:

Nicholas DiGiovanni, Jr., Esquire, Counsel  
Gary Wulf, System Personnel Director

I. BACKGROUND OF CASE

In April of 1977, the Keene State College PAT (Professional-Administrative-Technical) Staff Association, Affiliated with NHEA/NEA, submitted a Petition for Certification for a bargaining unit of PAT employees at the Keene State College. The University requested a hearing which was held, after which the appropriate unit was determined to be those PAT employees on the Keene campus. At a pre-election conference conducted by PELRB Chairman Edward J. Haseltine on September 29, 1977, the parties were in substantial agreement on the composition of the unit; i.e., the eligible voters. However, there was disagreement over whether three (3) assistant deans in the Division of Student Affairs and the College Business Administrator should or should not be included among those eligible voters. The College claimed the three (3) assistant deans were supervisory and confidential employees and thus excluded while the Association sought to have them included among the voters. Conversely, the Association sought the exclusion of the Business Administrator of the College as a confidential employee while the College urged his inclusion.

Chairman Haseltine ruled that all four employees should be excluded from the unit and the parties appealed the rejection of their respective positions.

The Board held a hearing at its offices in Concord on January 24, 1978 at which evidence was taken. Briefs were submitted to the Board which the Board has considered.

As additional background to this decision, it must be noted that one of the assistant deanships in question is held by Ernest Gendron, President of the Association. Mr. Gendron was promoted to his position of Assistant Dean, which accounts for one-fourth of his pay and, presumably, one-fourth of

his time, July 1, 1977 after his election as Association President. To this change the Association objected, alleging that the College had an anti-Association motive in making the change in position. The Association filed no unfair labor practice charge on account of the change.

Finally, the Board notes that the Supreme Court of New Hampshire, in the case Department of Revenue Administration v. SEA and PELRB, No. 7739 N.H. (December 2, 1977) directed this Board to "disclose which standard from among many suggested it is using to determine whether...employees are excluded..." as supervisor or confidential under RSA 273-A:8, II and RSA 273-A:1 IX (c) respectively. The Board began the process of defining its standards in the decision on remand in the Department of Revenue Administration v. SEA decision issued January, 1978. That process is continued in this decision. The Board believes that the best demonstration and definition of such standards is by a case by case application of principles rather than by the issuance of a rule or set of guidelines divorced from facts of actual cases. However, some of its basic principles are stated below for the guidance of the parties in this case and others interested.

## II. "SUPERVISORS" AND "CONFIDENTIAL EMPLOYEES"

As the Supreme Court noted in Department of Revenue Administration v. SEA and PERLB, supra, the Legislature did not avail itself of the opportunity to include definitions of the terms "supervisor" and "confidential employee" in the provisions of RSA 273-A, the Public Employee Labor Relations Act. The Legislature, and now the Court, has left it to the Board to decide these matters. The Board stresses that in this review of its principles and working definitions, it is enunciating concepts rather than language and that those relying on this decision in future cases do so at their own peril if they grasp tightly the words herein without following the ideas.

### A. SUPERVISORS:

RSA 273-A:8, II states, in pertinent part:

"Persons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise."

Other labor relations statutes contain broader definitions of the term which are both similar to each other and to the intention of the quoted statutory section, whether governing private sector or public employees.

The Federal Labor-Management Relations Act, 29 USCA § 152 (11) defines supervisor as:

"Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment."

The National Labor Relations Board has used and interpreted, further defined and refined this standard in the context of the statute it administers, one which excludes supervisors from those employees who can organize for collective bargaining. RSA 273-A contains no such prohibition, but merely requires the exclusion of supervisors from the same unit. The PELRB finds the definition

in the Labor-Management Relations Act to be helpful and to state several important concepts.

First, the supervisor must act in the interest of the public employer in his supervisory role.

Second, he must be a supervisor of other employees in a labor-relations context ("hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward or discipline other employees...to adjust their grievances"). The PELRB cannot adopt that portion of the definition which would include as a supervisor one who merely "directs" others, absent one or more of the other factors.

Third, the definition includes those who can "effectively recommend" such action and do not take actions which are of a "merely routine or clerical nature, but require(s) the use of independent judgment." This is a critical concept. It is the real, meaningful ability to take action or make a determinative recommendation on one of the quoted actions, not the position of an employee on a manning chart, the authority imagined by superior or lower-level employees, or the title of an employee which may or may not sound like it carries with it authority or power to do or have done any action, which is critical. Any of the other facts, perceptions or titles may be indications of supervisor status, and be given weight, but the power to act or the possession of real recommending power which most likely will be followed (as opposed to being a mere conduit in a personnel system or other evaluation process) is what is critical in a supervisor under RSA 273-A.

The mere action of supervising work product, without any personnel related functions, is not enough. In addition, scheduling the work of another, coordinating a "team" of workers, being the "foreman" of a group of workers doing similar jobs, or performing merely clerical actions which do not involve any significant discretion are not characteristic of supervisors.

The classification of an employee as a supervisor is not determined by the percentage of time spent "supervising" as opposed to performing other duties. Likewise, the amount of money, if any, paid for supervisory duties, will not be compared to total compensation to determine if a person is or is not a supervisor. While either might be evidence given weight with other factors, the actual supervisory power, not any mathematical formula, will be used to classify supervisors.

The PELRB's decisions as to public school teachers and faculty at the campuses of the University System, in which department chairmen were included in the bargaining unit as non-supervisory, indicate the complexity and sophistication of the concept, and must be reviewed when considering how much authority a person may have and how many functions a person may perform and still be considered a non-supervisor. The Board will continue to look at units closely to exclude only those with actual supervisory authority and not all alleged to have some imaginary supervisory characteristics. Further, the Board will continue to look to the parties to agree on those to be excluded as supervisors and will rarely set aside agreements between the parties, deciding the cases of disagreement only.

The New Hampshire Supreme Court, in University System of New Hampshire v. State of New Hampshire, et al; In re. University System of New Hampshire No. 7579 & No. 7580, N. H. (February 18, 1977) shed light on the supervisor question in regard to the same department chairman referenced above. Because that case has been cited to this Board often, the Board is constrained to express its reading of the requirements of that case. The case indicated, inter alia (among other things), that department chairmen did not have final authority to hire and fire or perform other functions. This was cited as one of the reasons why they were not found to be excluded as supervisors. That case should not be read and does not mean that final authority to hire or fire is required before a person is considered a supervisor. It held that the lack of such authority was a factor in not classifying department chairmen as supervisors. That finding supports the principle enunciated above that it is the real power or influence to effect such decisions and not formal or incidental participation in the process which must be present to be a supervisor.

It should be noted that the Federal Executive Order on governmental employee bargaining, other state statutes, and model acts such as the "State Public Employee Management Collective Negotiations Act" drafted by the Bureau of National Affairs; the "Model State Collective Bargaining Law for Public Sector Workers" by the American Federation of State, County and Municipal Employees; and the "Model Public Employee Collective Bargaining Law" by the American Association of School Administrators all recognize the principles and concepts enunciated by the quoted statute in identical or virtually identical language. The acceptance by such diverse groups, while not determinative, has been given weight by this Board in its consideration of the term supervisor.

The California "State Employer-Employee Labor Relations Act" appears to be both similar in basic concept and more sophisticated than other definitions by adding before and after the basic definition the following sentences:

"Supervisory employee means any individual regardless of job description or title having authority, in the interest of the employer...but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees." (emphasis added).

While not specifically adopting the language of that act, this Board commends it to public employers, employees, organizations and representatives because of the concepts contained therein when read with this decision's guidelines.

#### B. CONFIDENTIAL EMPLOYEES:

RSA 273-A:1 (IX) (c) excludes from the definition of "public employee: "Persons whose duties imply a confidential relationship to the public employer."

A confidential employee can be in one of two categories. First, an employee can be confidential as to policy-making responsibility as the person responsible for formulating personnel, labor relations or collective bargaining

policy for the public employer, either individually or as a necessary part of a team or process. Second, an employee can provide clerical, stenographic or related support to the individuals exercising the first function and be excluded from the bargaining unit as confidential. This second group was discussed in the Department of Revenue Administration v. SEA decision of this Board and the comments therein should be read to supplement this discussion. The concepts of confidentiality are largely common to both groups.

The National Labor Relations Board held, in B. F. Goodrich Company, 37 LRRM 1303 (1956), that an employee is not classified as confidential merely by having access to confidential records relating to budget or other financial data. The PELRB recognized this concept and expanded thereon in the Revenue Administration Case, as follows:

"Confidential employees, in the terms of a labor relations statute, are not those who merely deal with sensitive material or confidential matters, such as tax returns, 'state secrets', financial or personal matters which might be deemed 'confidential' in the sense that they should not be divulged to the general public. Indeed, most state employees (teachers, policemen, and others) have access to and are familiar with 'confidential' information and the drafters of the statute could not have intended that they be excluded from bargaining units. Rather, the Board finds that the meaning of the statute at a minimum is that confidential employees are those who have access to confidential information with respect to labor relations, negotiations, significant personnel decisions and the like." (emphasis added).

The California statute, cited above, defines confidential employee as:

"Any employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information contributing significantly to the development of management positions." (emphasis added).

The Model State Bargaining Bill, drafted by the Bureau of National Affairs, and other model acts, consider as confidential:

"One whose unrestricted access to confidential personnel files or information concerning the administrative operations of a public agency or whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process, would make his membership in the same organization as rank-and-file employee incompatible with his official duties." (emphasis added).

Several model acts add to this language the following further definition:

"(Confidential employee is) any employee engaged in personnel work other than a purely clerical capacity or who assists and acts in an intimate capacity to persons who formulate, determine and effectuate management policies in the field of labor and/or personnel relations, or any employee who has access to information subject to use by the employer in collective bargaining." (emphasis added).

The Board finds the emphasized language of the quoted statutes to contain the critical concepts concerning confidentiality. The participation in the process of formulation of labor relations or personnel policy in a meaningful sense and the need for stenographic or other support for that process and administration of the policies in more than a mere routine way are the bases of confidentiality. Mere access to information used in the process, however, is not enough for exclusion and the Board expressly rejects such a concept unless the access is accompanied by other aspects of confidentiality. In short, confidential employees are those who participate in the formation of management policy, contribute support to such policies and administer said programs or policies after their formation. Such activities would put those employees in an untenable position if in fact they were members of the bargaining unit.

Prior decisions of this Board have stated and the Board affirms its view that the numbers of excluded employees should be sufficient in number to allow the public employer to perform its personnel and labor relations functions without hindrance because of a lack of executive or stenographic support personnel. However, the Board will not give employers carte blanche to structure administrative teams, negotiating units or "policy-making" bodies so as to include virtually everyone in an alleged confidential position. Nor will the Board give determinative weight to titles or employer-drafted job descriptions alleged to establish confidentiality. It is need and actual function which shall control findings of exclusion on the basis of confidentiality.

Finally, the Board will not play a numbers game with its definitions. The percentage of a person's time spent on confidential matters is not crucial to a finding of confidentiality. There is no magic number or percent of personnel who will be found to be required as confidential to perform the labor relations functions. Rather, each case will be considered on its own facts and merit.

### III. FINDINGS OF FACT AND RULINGS OF LAW

Moving to the specifics of the Keene State College PAT matter, the Board first finds that the issue before it is the inclusion or exclusion of positions from the PAT unit. It is these positions, and not association offices held by persons occupying the positions, which must determine the result. Evidence relating to Mr. Gendron's election to the Association Presidency or elevation in his job is not relevant to this search. No unfair labor practice was brought. That would be the appropriate vehicle for consideration of such matters which will not be considered here.

#### A. Assistant Deans in the Division of Student Affairs

Testimony at the hearing established that the Assistant Deans in the Division of Student Affairs received new duties in the summer of 1977 which entailed both increases in salary and new responsibilities. This reorganization was the result of an ongoing review by both internal College personnel and outside consultants on the structure and operation of the Division. The review process had begun at least as early as January, 1977.

The Assistant Deans serve on the College Executive Committee. That Committee is made up of senior College personnel and its composition has evolved in light of recent labor relations activities as well as non-labor relations activities. The Executive Committee is the senior staff body which develops and discusses collective bargaining strategy, policy, and events from the management view. The System Personnel Director meets with the Committee

periodically. While the College has no right to pack this committee for the purpose of excluding any employees from any bargaining unit, the Board finds that the Committee does serve a real function in regard to labor relations. It must be allowed sufficient personnel to effectively function. The Board finds on the evidence that the three (3) Assistant Deans of Student Affairs are senior administrative officials of the College whose participation in the confidential process of formulating labor relations policy can justifiably be required by the College.

Although numbers do not control such a finding, the Board notes that the inclusion of these three employees results in ten employees out of over three hundred at the College being excluded because of the need for confidential consideration by executives of labor relations matters.

The Board finds the three assistant deans to be excluded from the PAT bargaining unit as confidential employees. This decision is not based upon their titles. It is conceivable that another person with that title would not be similarly excluded, depending upon function and need.

The uncontroverted evidence at hearing was that the three deans supervise, evaluate in a way that will most probably be determinative, and make personnel decisions regarding other PAT staff members. The Board therefore finds the three assistant deans to be excluded as supervisors as well as confidential employees.

B. Business Administrator

The evidence at the hearing established that the Business Administrator coordinates the finances and budget for the campus, acts as a special resource for the Executive Committee on financial matters which involves taking part in substantive development of labor relations policy, supervises payroll and related matters, has three PAT staff members whom he evaluates and oversees in a real rather than formal way, and, perhaps most critically, has served as one of the management negotiators in collective bargaining negotiations with operating staff.

The Board finds, therefore, that the Business Administrator position is both supervisory and confidential and that it must be excluded from the bargaining unit of PAT staff. In making this decision, the Board notes that the fact the Business Administrator supervises a large budget and employees other than PAT staff is not a basis for exclusion as a supervisor.

ORDER

The Board hereby determines that the determination of the composition of the PAT unit at Keene State College as found at the pre-election conference is affirmed, excluding the Business Administrator and three Assistant Deans in the Division of Student Affairs. The Board directs that an election be held expeditiously according to the Rules of the Board.



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EDWARD J. HASELTINE, CHAIRMAN

Signed this 23rd day of February, 1978

Board Members Allman and Anderson also voting; all concurred.

Also present: Board Clerk, Evelyn LeBrun and Board Counsel, Bradford Cook